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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

LARRY DICKINSON AND GIBBS ADAMS,

Petitioners,

v.

UNITED STATES OF AMERICA

On Petition For a Writ of *Certiorari* To
The United States Court of Appeals
For The Fifth Circuit

REPLY OF PETITIONERS TO BRIEF IN OPPOSITION

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REPLY OF PETITIONERS TO BRIEF IN OPPOSITION

Petitioners Dickinson and Adams hereby respectfully reply to the Brief in Opposition to Petitioners' Request for a Writ of *Certiorari*. Petitioners believe that the position taken by the government in this case is unpersuasive and untenable.

In reading the government's brief, one would hardly be aware that this case concerns an unprecedented prior restraint on the press, flatly inconsistent with the First Amendment, and explicitly contrary to the prior decisions of this court. Petitioners were convicted for failing to obey a decree whereby the District Court attempted to prevent the press from reporting material observed in open court, despite the clear pronouncement of this court that "a trial is a public event. What transpires in the court room is public property*** Those who see and hear what transpired can report it with impunity. There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit or censor events which transpire in proceedings before it."[1]

The government, of course, concedes the invalidity of the decree, and further concedes that the decree would not have to be obeyed if it were "patently invalid." The government urges, however, that petitioners' contempt conviction should be affirmed because the Court of Appeals below was not acting "frivolously," was attempting to "reconcile conflicting rights" (freedom of the press and the right to a fair and impartial trial), and its action "was not inconsistent" with prior Supreme Court decisions (Brief, pp. 7-9). Petitioners urge that the government is incorrect in each of these assertions.

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[1] See *Craig v. Harney*, 331 U.S. 376, 374 (1947).

The government's principal error lies in its failure to recognize the legal implications of the fact that we are here dealing with a *prior restraint* of the press. Such a direct constriction of First Amendment freedoms can be upheld, if at all, only upon the most compelling and pressing showing of actual overriding public need.[2] But no such showing had even been attempted to be made below. Indeed, it would be difficult to conceive of a more "patently" invalid and "frivolous" order than the one at issue here, which attempted to accomplish what this court has repeatedly indicated cannot be accomplished by any court: forbidding the press from merely reporting what they observed in open court.

The government attempts to meet the "heavy presumption" against the constitutional validity of the prior restraint by pointing to an alleged conflict between free press, on the one hand, and the right to a fair and impartial trial, on the other. The government contends that the Trial Judge found "that newspaper descriptions of the hearing would present a serious and imminent threat to the fairness of an upcoming trial." The government also asserts that the Trial Judge's findings in this respect "had substantial evidentiary support" (Brief in Opposition, pp. 10-11). The government, however, can cite no evidentiary support for these assertions, and for the very simple reason *that no such evidentiary support exists.* The proposition that factual newspaper descriptions of the hearing would pose a threat to anyone's right to a fair trial was a bare assertion of the Trial Judge, which found no evidentiary support in

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[2] See *New York Times Co. v. United States*, 403 U.S. 712, 313-14 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1936); see also *Near v. Minnesota ex. rel. Olsen*, 283 U.S. 697 (1931).

the record. At no time and in no way was there ever any demonstration that mere newspaper coverage posed a threat to anyone's constitutional rights. The Trial Court never made any factual "findings" in this respect, nor did it purport to base its order upon any such evidentiary showing.[3]

The Trial Court's opinion makes clear that the basis of its unsupported order was a *bare theoretical possibility* that in some unspecified way there *might* be some unspecified harm to unnamed and unspecified persons (emphasis added; see Pet. App. c. 2):

> It is ordered that no, no report of the testimony taken in this case today shall be made in any newspaper or by radio or television, or by any other news media. This case *will, in all probability,* be the subject of further prosecution; at least, there is the *possibility that it may.* In order to avoid undue publicity *which could in any way interferere* with the rights of the litigants in connection with any further proceedings *that might be had in this or other courts,* there shall be no reporting of the details of any evidence taken during the course of this hearing today.
>
> This order is made subject to the sanctions provided by law in the event of any violation of this order.

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[3] The Trial Court's assertion that mere newspaper coverage of a trial could prejudice someone's rights was not a conclusion of fact or law. It was merely an argument with history. The framers of the Constitution decided long ago that the greater danger lies in not allowing the press to cover a trial, and the First Amendment is written explicitly to prevent any court from attempting to shroud its proceedings with secrecy.

Paradoxically, the Court of Appeals itself relied upon the *absence* of any real disruption or invasion of Sixth Amendment rights as a ground for holding the order to be invalid.[4] The alleged collision course between constitutional rights, upon which the Brief in Opposition so heavily relies, had no basis in the real world, and was nothing more than a bare theoretical assumption of a future possibility. If the heavy burden which must be borne by the government to support any prior restraint can be met merely by the assertion of the possibility of a conflict arising in the future between constitutional rights, then freedom of the press as we know it would be held hostage to the fertile imagination of judges.[5] But, as this court has frequently pointed out,[6] such is not the law.

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[4] See Pet. App. A.10-A.12. The government has recognized this paradox in footnote 7 of its Brief in Opposition, though it does not face its implications. It is admittedly difficult for the government to argue, on the one hand, that there was a real threat to Sixth Amendment rights and, at the same time, recognize that the very implausibility of such a threat was the grounds upon which the decision it now supports relies.

[5] Or, indeed, the fertile imagination of government brief writers. See pp. 10-11 where the government's arguments with respect to the possibility of prejudice are based solely upon speculation devoid of evidence that the dangers which it decries, in fact existed.

[6] See *New York Times Co., Bantam Books, Near v. Minnesota ex. rel. Olsen, supra.*

The government (as did the Court of Appeals below) heavily relies upon this court's decision in *Walker v. City of Birmingham,*[7] despite the fact that *Walker* did not involve prior restraint of the press, and the fact that in *Walker* the court carefully and explicitly drew a distinction between the protection afforded to the communication of ideas by conduct such as picketing, and the protection afforded to those who communicate ideas by pure speech, a distinction which the court had earlier emphasized in *Cox v. Louisiana.*[8] The government seeks to avoid the impact of this distinction by asserting that the interest involved in protecting "an accused from prejudicial news stories is highly analogous to that involved in protecting people from excessive obstructions to the conduct of their daily affairs." (Brief, p. 12. footnote 8). But by this reasoning, almost any action could be termed "highly analogous" to free speech, and the distinction which the court carefully drew in *Walker* would be obliterated.[9]

The government urges that because petitioners could have sought review in the Court of Appeals on the very day of the injunction, and the court would have afforded "speedy and effective but *orderly* review of the injunction

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[7] 388 U.S. 308, 316 (1967).

[8] 379 U.S. 536, 555 (1965).

[9] It is submitted that there is a far stronger "analogy" between picketing and free speech than the strained analogy which the government attempts to assert in its brief (footnote 8) between protection from prejudicial news stories and protection of people from the actions of others. Yet, the existence of such facile analogies did not prevent the court from making the clear distinction between speech and action which lies at the basis of its *Walker* and *Cox* decisions.

in question swiftly enough to protect the right to publish news while it was still 'news' ", (Brief p. 13, emphasis in original) they therefore were required to do so, and could not violate even an invalid order until its invalidity had been determined by direct (rather than collateral) attack. There are at least two difficulties with this position. First, the government again ignores the simple fact that with respect to the press, a court-imposed injunction for as little as a day or an hour is a prior restraint which is presumptively and *prima facie* invalid. Admittedly, the policy against prior restraints is unique. But it is unique exactly because this court has recognized the overwhelming importance of a free press to the conduct of the nation's business. A prior restraint is no less noxious because it operates during a period of so-called "rapid review" than it would be if it operated during a longer, more normal procedure.

Moreover, it is sheer speculation on the government's part that review would have been "speedy and effective but *orderly*." How speedy is speedy? And how long does it take before a story no longer becomes newsworthy? Petitioners point out that they filed their notice of appeal from the District Court's contempt conviction on September 8, 1971. The Court of Appeals order invalidating the judge's injunction against the press, and remanding the case to the District Court for consideration of the contempt conviction in view of its invalidation of the underlying order, was not remanded until August 22, 1972, *more than nine months later*. Although this time table might have been speeded up, there is simply no way of knowing whether the review proceedings could possibly have been finished "swifty enough to protect the right to publish news while

it was still news.' "[10] More important, how can the government justify forcing news reporters and newspapers to undertake costly litigation to review muzzle orders which are in violation of the Supreme Court's repeated admonitions against prior restraints? It is precisely the necessity of undertaking such review proceedings which constitutes the "chilling effect" against which the doctrine forbidding prior restraints was constructed.

The balance of the government's brief is devoted to a rather tortuous attempt to reconcile the Court of Appeals' opinion below with numerous federal and state cases which point precisely in the opposite direction. Petitioners believe no extended discussion is necessary here because the government's reasoning falls of its own weight. The significant point, however, is that nowhere does the government assert that:

a. The question presented is unworthy of considerations by this court, or

b. The question is of such limited scope as to render review inappropriate.

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[10] Even the Pentagon Papers case, of momentous impact on the nation, took more than a month before the Supreme Court issued its final ruling, after invoking extraordinary procedures, and in the face of an opinion by the Chief Justice that the process had been far too swift for orderly review. See *New York Times Co. v. United States*, 403 U.S. 712, 748 (1971). Does the government seriously contend that justice is advanced by forcing reviewing courts to operate under excrutiating time pressures?

The reason for these omissions is clear. The instant case presents a question of vital importance to a free press. If the Court of Appeals decision is allowed to stand, a weapon would be loosed which would render the First Amendment prohibition against restriction of the press less a shield than a chimera. Petitioners urge that the record requires either summary reversal or grant of the requested writ.

Respectfully submitted,

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